OCT 24 195
HAROLD B. WILLEY

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 399

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner,

versus

GEORGIA, ASHBURN, SYLVESTER & CAMILLA RAILROAD COMPANY,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Georgia, or, in the Alternative, to the Court of Appeals of Georgia.

BRIEF FOR RESPONDENT IN OPPOSITION.

JULIAN WEBB,
Donaldsonville, Georgia,
VANCE CUSTER,
CHARLES H. KIRBO,
Bainbridge, Georgia,
Attorneys for Respondent.

SUBJECT INDEX.

	PAGE
JURISDICTION	1
QUESTIONS PRESENTED	2
ARGUMENT	3
CONCLUSION	12

TABLE OF CASES.

Abel v. State, 190 Ga. 651, 653, 61 S.E. 2d. 832	4
Baily v. DeCrespigny, LR 4 QB 180, 15 Eng. Rul. Cas. 799	11
Bank of Chatsworth v. Hagedorn Construction Co., 156 Ga. 348, 119 S.E. 28	11
Barraus v. Jackson, 346 U.S. 249, 73 S. Ct. 1031, 97 L. Ed. 1586	8
Beckman v. Atlantic Refining Co., 181 Ga. 456, 182 S. E. 595	3
Campbell v. Burton, 182 Ga. 354, 185 S.E. 323	6
Carr v. L. & N. R. Co., 141 Ga. 223, 80 S.E. 716	9
Dunaway v. Gore, 164 Ga. 219, 138 S.E. 213	3
Ellington v. State, 204 Ga. 456, 49 S.E. 2d. 872	6
Fidelity & Guaranty Co. v. State of Oklahoma, 250 U.S. 111, 39 S. Ct. 3[illegible], 63 L. Ed. 876	6
Huebert v. Chicago, 202 U.S. 275, 26 S. Ct. 617, 50 L. Ed. 1026	5
Huiett, Commissioner, et al. v. Dayan, et al., 194 Ga. 250, 21 S.E. 2d. 423	4
Mouch v. Indiana Rolling Mill Co., 93 Ind. App. 540, 141 N.E. 137	11
Pa. R. Co. v. Illinois Brick Co., 297 U.S. 447, 56 S. Ct. 556, 80 L. Ed. 796	5

TABLE OF CASES—(Continued)

	PAGE
Persons v. Lea, 207 Ga. 384, 61 S.E. 2d. 832	4, 5
People v. State of California, 1953, 73 S. Ct. 293, 344 U.S. 357, 97 L. Ed. 387	5
Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 65 S. Ct. 1475, 89 L. Ed. 2092	5, 8
Savannah Bag Co. v. Citizens Bank & Trust Co., 40 Ga. App. 370, 149 S.E. 710	9
Stembridge v. State of Ga., 343 U.S. 541, 72 S. Ct. 834, 96 L. Ed. 1130	5
Stewart v. Board of Commissioners of Echols County, 192 Ga. 139, 14 S.E. 2d. 728	4
Tidal Oil Co. v. Flanagan, 263 U.S. 444, 44 S. Ct. 197, 68 L. Ed. 382	7
Yarbrough v. Ga. Railroad & Banking Co., 176 Ga. 780, 168 S.E. 873	4

OTHER AUTHORITIES.

31 Corpus Juris 260	10
3 Corpus Juris Secundum 898	10

DARK PA

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

No. 399.

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner,

versus

GEORGIA, ASHBURN, SYLVESTER & CAMILLA RAILROAD COMPANY,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Georgia, or, in the Alternative, to the Court of Appeals of Georgia.

BRIEF FOR RESPONDENT IN OPPOSITION.

JURISDICTION.

Petitioner has failed to comply with Rule 23f of the Rules of this Court and the petition does not therefore show whether or not the federal question alleged to be involved was timely and properly raised. Had this rule been complied with, the petition would have shown that the Supreme Court of Georgia was without jurisdiction

BLEED THRU

to review the decision of the Court of Appeals of Georgia and that this Court is without jurisdiction to review same.

The constitutional question was first injected, and then not sufficiently, in the petition for certiorari to the Supreme Court of Georgia in paragraph 4 of the conclusion in said petition in the following language: "The decision of the Court of Appeals so clearly disregarded the valid and enforceable terms of the contract upon which the suit is predicated that it amounts to and deprives the plaintiff of due process of law under the Fourteenth Amendment under the Constitution of the United States."

This question was never argued in either Court and in the final motion for reconsideration of the judgment of the Supreme Court of Georgia denying application for certiorari, the so-called constitutional question was not raised or referred to and the Court was not asked to reconsider that question.

For the reason that the constitutional question was not timely and sufficiently raised in the trial court, neither the Georgia Appellate Court nor this Court has jurisdiction. Likewise, since the question was not preserved in the motion for reconsideration, this Court is without jurisdiction.

QUESTIONS PRESENTED.

The questions presented are:

1. Has the petitioner timely and sufficiently raised the alleged constitutional question and does this Court have jurisdiction to hear and determine the same?

DARK PA

2. Assuming that the Court has jurisdiction, is a federal or constitutional question presented?

3. If so, did the Court err in holding the contract unenforceable?

ARGUMENT.

1. No Federal or Constitutional Question was Timely or Sufficiently Raised in the State Court.

Petitioner was non-suited in the trial court and in conformity with the State practice, the Court of Appeals reviewed the decision of the trial judge and held that the contract sued upon was unenforceable.

In none of the pleadings or briefs in the Court of Appeals was a federal or constitutional question raised. In the motion for re-hearing, addressed to the Court of Appeals, no federal or constitutional question was raised but in the petition for certiorari to the Supreme Court of Georgia, reference was made to the fourteenth amendment to the Federal Constitution, without specifying or defining just how the decision of the court violated this amendment. Under the Georgia rule, assignments of error upon constitutional questions which are raised for the first time in the bill of exceptions will not be considered. *Dunaway v. Gore,* 164 Ga. 219 (138 S.E. 213). *Beckman, et al. v. Atlantic Refining Co.,* 181 Ga. 456 (182 S.E. 595).

A constitutional attack upon an act or statute, which does not allege specifically how or wherein the act or

E BLEED THRU

statute violated a designated provision of the constitution, is insufficient to present any question for review. *Persons v. Lea,* 207 Ga. 384 (61 S.E. 2d 832).

Likewise, the Supreme Court of Georgia is not called upon to pass on constitutional questions unless such questions are passed upon by the trial judge and clearly specified.

"This Court will not pass upon the constitutionality of an act of General Assembly, unless it clearly appears in the record that the point was directly and properly made in the court below and distinctly passed on by the trial judge. *Yarbrough v. Georgia Railroad & Banking Co.,* 176 Ga. 780 (168 S.E. 873).

"In order to raise a question as to the constitutionality of a statute, 'the statute which the party challenges and the provision of the constitution alleged to have been violated, must both be clearly specified; and it must also be shown wherein the statute violates such constitutional provision.' *Abel v. State,* 190 Ga. 651, 653 (10 S.E. 2d. 198). See *Stewart v. Board of Commissioners of Echols County,* 192 Ga. 139 (2) (14 S.E. 2d. 728)."

Huiett, Commissioner, et al. v. Dayan, et al., 194 Ga. 250, 21 S.E. 2d 423.

These rules of practice have been approved and recognized by this Court. "It is apparent from the record that the Supreme Court of Georgia took no action upon the question of federal constitutional rights raised for the first time on the motion for re-hearing in the Court of

Appeals. This was in accord with its rule that constitutional questions must first be raised in the trial court. The attempt to raise the question of constitutional rights in the general terms of the above quotation from the petition for certiorari did not begin to meet the requirements of the Supreme Court of Georgia for definiteness." Citing *Persons v. Lea supra; Steambridge v. State of Georgia,* 1952, 72 S. Ct. 834, 343 U.S. 541, 96 L. Ed. 1130. Continuing, the Court said: "At this stage, the Supreme Court of Georgia could have denied certiorari on adequate state grounds. Where the highest court of the state delivers no opinion and it appears that the judgment might have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment." Even if the Court of Appeals be regarded as the trial court as respects this particular issue, the constitutional question could have and should have been raised in the motion for rehearing addressed to the Court of Appeals.

Where the highest court of the State has declined to consider federal constitutional questions on the ground that they were not raised at the trial, the Supreme Court of the United States is without jurisdiction to consider them. *Pennsylvania R. Co. v. Illinois Brick Co.,* 1936, 56 S. Ct. 556, 297 U.S. 441, 80 L. Ed. 796. *Huebert v. Chicago,* 1906, 26 S. Ct. 617, 202 U.S. 275, 50 L. Ed. 1026; *Radio Station WOW, Inc. v. Johnson,* 1945, 65 S. Ct. 1475, 326 U.S. 129, 89 L. Ed. 2092. *People v. State of California,* 1953, 73 S. Ct. 293, 344 U.S. 357, 97 L. Ed. 387.

To give the Supreme Court jurisdiction of error in state court mere assertion of a claim in respect of some

constitutional right is not enough but there must be a real and substantial controversy of the required character which deserves serious consideration. *U.S. Fidelity & Guaranty Co. v. State of Oklahoma,* 1919, 39 S. Ct. 399, 250 US 111, 63 L. Ed. 876.

Even had the question been sufficiently and timely raised when petitioner filed a petition for reconsideration to the Supreme Court of Georgia in which the federal or constitutional question was not again urged or considered, such question was abandoned. *Campbell v. Burton,* 182 Ga. 354, 185 S.E. 323; *Ellington v. State,* 204 Ga. 456, 49 S.E. 2d. 872.

2. No Federal or Constitutional Question is Presented.

It is contended that section 26b of Title 49 USC is involved. Certainly this could not inject a federal question. The state court was not called upon to construe or apply this section and the decision of the state court is in nowise in conflict with the authority granted the Interstate Commission under that Section. It appears from the record that the commission had taken two steps in respect to the railroad crossing involved. One, the commission had directed that the petitioner make certain repairs and improvements on the crossing and second, the commission had relieved the respondent from the burdens of the order requiring the crossing to be repaired and improved. (Brief of evidence in Worth Superior Court, page 12.) (The respondent does not have the benefit of the record in this court and can not refer to the pages therein.) Should it be contended that the Interstate Commerce Commis-

sion has exclusive jurisdiction over this matter, then the petitioner's remedy was to pursue the question further before that body. The state court has not arbitrarily taken jurisdiction of the matter but it is through the action of the petitioner that the state court was called upon to pass on the validity of the contract, construe the same and adjudicate the rights of the parties thereunder. The contract in nowise refers to the Interstate Commerce Commission and the question is only incidentally raised in that the petition requests the court to substitute the Interest Commerce Commission for other governing bodies mentioned in the contract.

While the casual reference to the 14th Amendment of the Federal Constitution in the application for certiorari to the Supreme Court of Georgia did not sufficiently raise the constitutional question, even if it had, this Court would have no jurisdiction to pass upon the same. The petition did not complain of any statutes or legislation of the Court depriving it of any constitutional rights but merely that the decision of the Court of Appeals deprived it of such rights.

In *Tidal Oil Co. v. Flanagan,* 1924, 44 S. Ct. 197, 263 US 444, 68 L. Ed. 382, this question was passed upon in unmistakable language. "The mere reversal by a state court of its previous decision, as in this case before us, whatever its effect upon contracts, does not, as we have seen, violate any clause of the Federal Constitution. Plaintiff's claim whatever it was does not raise a substantial federal question. This has been decided in so many cases that it becomes our duty to dismiss the writ of error for want of jurisdiction."

This case was cited, approved and followed in *Barraus v. Jackson*, 1952, 346 U.S. 249, 97 L. Ed. 1586, 73 S. Ct. 1031.

The Supreme Court of the United States will not review a state decision resting on an adequate and independent non-federal ground even though the state court may have also summoned, to its support, an erroneous view of Federal law. *Radio Station WOW, Inc. v. Johnson, supra.*

The decision of the Court of Appeals is a construction of the Georgia contract dealing with Georgia property supported by Georgia authority and decides only state questions.

If it be contended that the construction of any contract dealing with real property which was owned, used or passed over by persons or corporations dealing in Interstate Commerce, presents a federal question it would present the federal court with jurisdiction of a substantial part of all litigation arising out of land contracts in the United States.

3. The Court did not Err in Holding the Contract Unenforceable.

Petitioner does not even contend that the decision of the Court of Appeals reverses any previous decisions but contends that it is in conflict with general rules of law. We feel that the written opinion of the Court gave ample authority to support it but it is supported by many other Georgia cases.

"The rule as to certainty is thus laid down by Chitty on Contracts: 'The rule as to certainty is that the agreement must be so certain and complete that each party may have an action on it.' The converse holds equally true, viz., that where a contract is so uncertain and incomplete that neither party can maintain an action on it, it is void for uncertainty." *Carr v. L. & N. Railroad Co.*, 141 Ga. 223, (80 S.E. 716.) In that case, the plaintiff was suing on a contract where he was to have the use of water, free of charge, on his premises from a water tank belonging to the railroad company. The court points out that the contract does not designate any specific quantity of water that the plaintiffs are entitled to use. "No amount being specified, the alleged agreement is void under the rule laid down above."

The contract in the instant case is equally uncertain as to the extent of the signalling devices to be installed. The second party is required to improve or erect new and improved signals deemed proper and advisable by party of the first part.

"A contract by which a banking corporation agreed to make periodic loans of money to another from time to time within a stipulated period, without any limitation on the aggregate to be loaned at any one time, but that the loans be made from time to time as the borrowers needs might require, was too indefinite and uncertain, as respects the obligation resting upon the bank, to be capable of enforcement." *Savannah Bag Co. v. Citizens Bank & Trust Co.*, 40 Ga. App. 370, 149 S.E. 710.

contract, such change is presumed to be excepted therefrom."

Certainly the construction of a contract relating to real property located in the State of Georgia, dealing with covenants running with the land presents a state question.

The opinion written in the Court of Appeals is based upon sound reasoning and is amply supported by proper Georgia authorities and should be affirmed.

CONCLUSION.

The Court should deny jurisdiction of the writ, or if jurisdiction is assumed, the decision of the state court should be affirmed.

Respectfully submitted,

JULIAN WEBB,
Donaldsonville, Georgia,
VANCE CUSTER,
Bainbridge, Georgia,
CHARLES H. KIRBO,
Bainbridge, Georgia,
Attorneys for Respondent.